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89-709

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

ANTHONY HAWKINS,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

WAYNE COUNTY PROSECUTOR'S OFFICE

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QUESTION PRESENTED

DOES YBARRA V ILLINOIS COMPEL THE CONCLUSION, AS THE MICHIGAN COURT OF APPEALS HELD IT DOES, THAT A SEARCH WARRANT FOR PRIVATE PREMISES DOES NOT PERMIT A SEARCH OF REASONABLE SCOPE AND INTENSITY OF PERSONS ON THE PREMISES WHERE THE ITEMS PARTICULARIZED IN THE WARRANT MIGHT REASONABLY BE EXPECTED TO BE CONCEALED ON THE PERSON ?

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IN THE SUPREME COURT OF THE UNITED STATES

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THE PEOPLE OF THE STATE OF MICHIGAN,

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vs.

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PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of Research, Training and Appeals, and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the

State of Michigan entered in the above-entitled cause on March 7, 1989, leave to appeal denied by the Michigan Supreme Court September 20, 1989, (three justices dissenting).

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported and is appended as Appendix B. The Order of the Michigan Supreme Court is unreported at present and is appended as Appendix A.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on March 7, 1989. The judgment of the Michigan Supreme

Court was entered on September 20, 1989. The jurisdiction of this Court is invoked under 28 USC (1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Defendant was bound over on a charge of possession of cocaine with intent to deliver. On a motion to suppress Officer Sosa testified that he was a Detective Specialist with the State Police, Criminal Investigation Division, Narcotics Unite. On May 29, 1986, he engaged in the execution of a federal search warrant at 290 Geneva in the City of Highland Park. The address was a residential dwelling (EH 15). The warrant was for narcotics and weapons, and the affidavit stated that an individual known as "Hawk" had sold cocaine from the residence. Anthony Hawkins was the only person present in the home, though the Detective did not

know whether he was "Hawk" or not (EH 16, 19). Defendant was detained and frisked. While he was frisked the Detective felt rock cocaine in defendant's pocket, and retrieved it. Defendant was arrested (EH 17-18).

The trial judge held that suppression was mandated by People v Burbanks, 137 Mich App 266 (1984), which in turn held suppression mandated by Ybarra v Illinois, 444 US 85 (1979). The Court of Appeals agreed. The concurring opinion noted that "The prosecutor presents an argument which might have supported a trial court's decision to admit this evidence. This case is easily distinguishable from Ybarra v Illinois....Full consideration of a reasoned opinion developing a contra ruling would merit attention" (Slip op,

concurring opinion, at 1).

The Michigan Supreme Court denied leave to appeal on September 20, 1989, three justices dissenting.

REASONS FOR GRANTING THE WRIT

There is no question but that the detention of defendant for the full and safe execution of the search warrant was proper. Michigan v Summers, ___US___, 69 L Ed 2d 340 (1980). The question here is whether the search of the defendant, under the circumstances here presented, was proper even though defendant was not named in the warrant as a place to be searched (or, at least, it must be said that the searching officer did not know whether he was the person named).

Ybarra v Illinois, 444 US 85 (1979) should not be read as controlling the instant case. The Michigan Court of Appeals held that it is controlling, and this application of precedent from this Court constitutes an issue requiring the plenary review of this Court. The search warrant involved in Ybarra authorized the

search of the "Aurora Tap Tavern... Also the person of 'Greg' the controlled substances, money, instrumentalities and narcotics paraphernalia used in the manufacture, processing and distribution of controlled substances." This Court stated that the search of Ybarra's person could not be justified by the warrant, holding that the warrant gave the officers "no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." 62 L Ed 2d at 246. Ybarra is distinguishable from the case at bar in several important respects: 1) Ybarra involved a place of public accommodation, this case a private residence; 2) in Ybarra heroin packets were observed only behind the bar and on the person of the bartender; here, someone in the house had sold drugs to an informant; 3) here, a

pat down revealed a substance familiar to the officer as a carrier of narcotics; not so in Ybarra.

Petitioner would note that although there are pre-Ybarra cases supporting petitioner's position, see e.g. People v Pugh, 69 Ill App 2d 312, 217 NE 2d 557 (1966); People v Kielczynski, 264 NE 2d 767 (Ill App 1970); People v Harrison, 226 NE 2d 418 (1967); People v McHale, 281 NE 2d 776 (1972), few cases have considered the question post-Ybarra. Those few that have have rejected a private premises/public premises distinction, based primarily on United States v De Ri, 332 US 582 (1947). See People v Gross, 465 NE 2d 119 (Ill App 1984); Lippert v State, 664 SW 2d 712 (Tex Cr App 1984); State v Weber, 668 P 2d 475 (Or App 1983); State v Lambert, 710 P 2d 693 (Kan, 1985); White v United States, 512 A 2d 286 (DC App, 1986).

Petitioner submits that these cases represent what appears to be an emerging trend misapplying Ybarra, and that plenary review is thus required. Petitioner further submits that a search of reasonable scope and intensity of persons on private premises pursuant to a search warrant for those premises, where the items sought could easily be concealed on the person, should be permitted on the basis that the pockets of persons are places within the premises just as are desk drawers and closets.

On close analysis, Di Re does not support a contrary rule. Di Re involved a warrantless search. An officer was informed by one Reed that Reed was to buy counterfeit gasoline ration coupons from one Battita. Battita was followed as he went to the appointed place. Officers

approached the auto -- Reed had coupons in his hand and said he had received them from Battita, who was sitting in the driver's seat. Di Re was a passenger, and the officers had no information whatsoever regarding him. He was arrested and searched, and counterfeit coupons found on his person. The Court held that simply because there was probable cause to believe that Battita possessed coupons this gave no probable cause to search Di Re, nor to arrest him. The opinion, however, contains some unfortunate dicta. The government had conceded that a warranted search of premises would not justify a search of persons on the premises (the precise question at issue here), and the Court reasoned that an unwarranted search of an auto would not justify a search of all occupants. But clearly the facts

demonstrate that the officers only had reason to believe Reed and Battita possessed coupons. To cite Di Re for the proposition that a private premises directed warrant will not allow a search of the person is thus misleading.

Although recognizing that it was unable to persuade a majority of the Court in Ybarra, petitioner submits that the logic of Justice Rehnquist's dissent is compelling in considering a search of persons on private premises. A search warrant is an anticipatory authorization to search. Just as officers cannot necessarily foresee the existence of closets, cupboards, desks, nightstands, and briefcases, neither can they necessarily foresee the existence of persons with either an interest in the items to be seized or an interest in

frustrating the warrant. Where the warrant clause has been satisfied and probable cause to search private premises determined by a neutral judicial officer, a search of reasonable intensity for the sought after items is permitted. A search of reasonable intensity includes the pockets of persons on private premises where the items named in the warrant could be concealed on the person.

That a police officer armed with a search warrant for premises may conduct a search of reasonable scope and intensity of persons on the premises where the items named in the search warrant could reasonably be expected to be concealed on the person is commended by policy and logic, particularly when the existence of knock and announce requirements is considered. Before officers executing a

search warrant may force entry they must request admittance, giving notice of their authority and purpose. MCL 780.656. Case law holds that after announcing their authority and purpose the officers must wait long enough for the inhabitants of the premises to reach the door from the room farthest away before forcing entry. See e.g. People v Harvey, 38 Mich 39; 195 NW 2d 773 (1972). Obviously, it would be a simple matter for a person present in the premises to pick up the item named in the warrant and put it in his pocket (where the item is of a sort easily concealed in a pocket). Or, upon seeing the approach of officers a person present in the premises could put the item, for example, a package of heroin, in his pocket and walk out the door. Perhaps not observing the officers, one present in the premises

might put the heroin in his pocket and walk out the door on the way to a delivery. The purpose of the warrant should not be frustrated by such facile maneuvers. A search of reasonable scope and intensity of persons on private premises which are being searched pursuant to a warrant, where the items sought could easily be concealed on the person, considering the pockets of the persons to be placed within the premises and thus covered by the warrant, is a reasonable search, and thus within the Fourth Amendment. The search in the instant case was within the scope of the warrant.

Petitioner would here note that certiorari was denied by this Court in Michigan v Little, 88 L Ed 2d 563 (1985), presenting the same issue as the instant

petition. However, it is worth observing that three justices would have granted certiorari, and stated in dissent that

> Ybarra in no sense controls this case....Evidence of (drug) activity could have been placed on the person of someone in the premises as easily as it could have been hidden in a dresser drawer....the police reasonably concluded that the nexus between respondent Little and the illicit drug activity was sufficiently close to give them probable cause to conduct a cursory search of respondent's person as part of their search of Johnson's home pursuant to a valid search warrant....The Michigan Court of Appeals misconstrued Ybarra and its decision represents an unwarranted

> **expansion of our holding in that case. This is the kind of result that undermines public confidence in the administration of justice** (emphasis added).

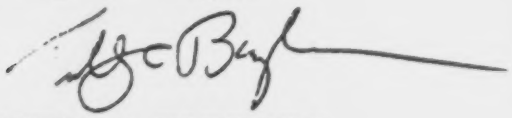
Petitioner requests that this Court examine this important and recurring question.

CONCLUSION

WHEREFORE, Petitioner requests that this Court grant plenary review.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne



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APPENDICES

ORDER OF THE MICHIGAN SUPREME COURT

ENTERED: September 20, 1989

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 85782
COA: 97950
LC: 86-673693

ANTHONY D. HAWKINS
Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

RILEY, C.J.; BOYLE, AND GRIFFIN, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of an order entered at the direction of Court.

/s/Jacqueline M. MacKinnon Clerk

Deputy

OPINION OF THE MICHIGAN COURT OF APPEALS

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant

V March 7, 1989

ANTHONY B. HAWKINS
Defendant-Appellee.

Docket No. 97950

BEFORE: MICHAEL J. KELLY, P.J., and MAHER AND M. WARSHAWSKY, JJ.

PER CURIAM

Defendant was charged with possession of cocaine with intent to deliver. MCL 333.7401(2)(a); MSA 14.15(7401) (2)(a). Defendant moved to suppress the cocaine evidence and for dismissal of the charge. The Wayne Circuit Court granted defendant's motion. Plaintiff appeals by right and we affirm.

On May 29, 1986, Detective John Sosa of the Michigan State Police Criminal Investigation Narcotics Unit executed a federal search warrant for 290 Genevia, a residential home in Highland Park. The warrant authorized a search of the premises for narcotics and weapons. The warrant did not authorize the search of any persons, but the affidavit indicated that a person known as "Hawks" was selling $20 packages of cocaine from the residence.

Detective Sosa, along with other officers, arrived at 290 Genevia around 11:00 a.m., announced their presence and entered. Defendant was detained and searched "primarily for weapons." Detective Sosa found rock cocaine in defendant's trouser pocket and defendant was arrested and taken into custody. Defendant's driver's license indicated that he lived at 298 Genevia.

No narcotics were found on the premises, but a .22 caliber rifle was taken from underneath a couch in the living room following defendant's arrest. Also, after defendant's arrest and during the execution of the warrant, a cable guide book was found with defendant's name and the 290 Genevia address.

Defendant was the only person found on the premises and Detective Sosa had no reason to believe that defendant was

"Hawks." Detective Sosa had never seen defendant coming or going from 290 Genevia and it was the first time he had encountered defendant.

Defendant lives at 298 Genevia with his mother. Defendant's sister lives at 290 Genevia and the cable guidebook bore defendant's name because the subscription was in his name. Defendant knew of no one by the name of "Hawks".

At the evidentiary hearing held on defendant's motion on November 10, 1987, the trial court noted that the warrant did not mention defendant and that the cable guide linking defendant to 290 Genevia was found after the search and his arrest. The court concluded that while the detention of defendant to pat him down for weapons was permissible, Detective Sosa had no authority to search

defendant's trouser pockets because no probable cause existed to believe defendant possessed narcotics or to arrest defendant.

On appeal, the prosecutor argues that the search warrant for the private premises should have been held to include a search of reasonable scope of all those found on the premises where the items particularized in the warrant might reasonably be expected to be concealed on those persons. The prosecutor contends that such an extension is justified in the present case because it was reasonable to believe, under the circumstances, that narcotics or other contraband might have been found on defendant. We disagree.

This Court has declined on several occasions the invitation to extend the scope of a search warrant of a premises to include all those found on the premises. See People v Hawkins, 163 Mich App 196, 413 NW2d 704 (1987); People v Burbank, 137 Mich App 266; 358 NW2d 348 (1984), lv den 419 Mich 917 (1984), cert den 469 US 1190; 105 S Ct 962; 83 L Ed 2d 967 (1985).

Our Supreme Court, in People v Arterberry, 431 Mich 381, ____ NW2d ____ (1988), recently had before them a prosecutor appeal similar to the instant case, where the trial court had found that a search of defendant had exceeded the scope of the warrant. In Arterberry, the police had a warrant to search a residence and a person named "Doug". The police forcibly entered the residence

after they heard someone running in response to their knock at the door. Several occupants, including Arterberry, were then subjected to a Terry weapons search. A locked tool box, found at the residence, was forced open by the police. It was found to contain a quantity of controlled substances. The occupants were then searched for the key, which was found in Arterberry's possession. The Supreme Court held the search proper as a search incident to arrest. Id., p 384. The police acted within the scope of the warrant only in opening the tool box. Once controlled substances were discovered, the police had probable cause to arrest the occupants for loitering a place of illegal occupation or business. Id., p 383.

The Arterberry Court was careful to distinguish Ybarra v Illinois, 444 US 84; 100 S Ct 338; 62 L Ed 2d 238 (1979), where the United States Supreme Court held that defendant's coincidental presence at a tavern where a search warrant had been issued authorizing a search of the premises and "Greg", the bartender, did not provide probable cause to search defendant. The Ybarra Court stated that, in Ybarra, there was no basis for the search other than Ybarra's presence in the tavern. Arterberry, supra, pp 385-386.

In the present case, unlike in arterberry, the police did not have probable cause to arrest defendant before engaging in the challenged search. The police did not find any inculpatory evidence at the Genevia residence to connect defendant with an illegal

activity. There is no element of flight from the police or other behavior which would have given the police a reason to believe that defendant was involved in criminal activity. Here, Hawkins' presence at the residence provided the sole basis for the search. Thus, we find this case, unlike Arterberry, controlled by Ybarra.

We are similarly unpersuaded by the prosecutor's attempt to distinguish Ybarra as a place of public accommodation from the instant case involving a private residence. Although these facts may give rise to a different assessment, see Arterberry, supra, p 386, n 7, one can reasonably expect as much privacy, if not more, when using a private residence as opposed to being a patron in a public place. See Burbank, supra, p 271. We note, however, that where circumstances

within a private residence give rise to a reasonable belief that the occupants are engaged in a criminal activity, as in Arterberry, any expectation of privacy on the part of the occupants would clearly be an unreasonable one, as compared with patrons in a public establishment. That is, where circumstances provide police with a reasonable believe of criminal activity, a public place may offer more privacy to the individual than a private residence. A search warrant, in and of itself, however, cannot provide probable cause to indiscriminately search all those found in a named premises, and the prosecutor cites no authority for such a proposition. Under Ybarra or Arterberry, this would constitute an unreasonable extension of police power under the Fourth Amendment.

In the present case, the police improperly extended the warrant in searching defendant. Defendant was not a resident at the premises nor did the police have probable cause to believe defendant was involved in a criminal activity. We do not find the trial court's suppression of the evidence to have been clearly erroneous. People v Russell, 152 Mich App 537, 540; 394 NW2d 9 (1986).

Affirmed.

/s/ Richard M. Maher

/s/ Meyer Warshawsky

KELLY, P.J. (Concurring)

I concur in the result reached in the per curiam opinion, but not in its reasoning. The standard of review of the circuit court's grant of defendant's motion to suppress evidence on the ground that it is illegally obtained is the clearly erroneous standard. People v Russell, 152 Mich App 537, 540; 394 NW2d 9 (1986). A ruling is clearly erroneous if the Court of Appeals is resolutely convinced that a mistake has been made. I am not firmly convinced that the trial court clearly erred in excluding this evidence, and so concur in affirming the trial court's decision.

However, if the trial judge had found this evidence admissible, I probably would agree that such a decision was also

not clearly erroneous. The prosecutor presents an argument which might have supported a trial court's decision to admit this evidence. This case is easily distinguishable from Ybarra v Illinois, 444 US 84; 100 S Ct 338; 62 L Ed 2d 238 (1979); a private residence containing one occupant is not analogous to a crowded tavern open to the public. Full consideration of a reasoned opinion developing a contra ruling would merit attention.

/s/ Michael J. Kelly